In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 546

IRVING SILVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

1. The petitioner, a veteran, received a career appointment with the Internal Revenue Service (I.R.S.) as a Revenue Officer, GS–7, on the basis of a federal entrance examination. The appointment commenced on June 3, 1963, and was subject to a one-year probationary period. Petitioner was notified that his appointment was terminated as of June 1, 1964, by a letter of separation from the New York District Director dated May 26, 1964. In accordance with 5 C.F.R. 315.804 (1964 ed.), the following reasons were given for termination (R. 3):[1]

[1] "R." references are to the record in the Court of Claims, which has been filed in this Court.

280-558—67——1

> * * * your work performance and attitude have been unsatisfactory due to your failure to absorb and practice the fundamentals of Delinquent Account servicing procedure in the field; your indifferent attitude toward your work; your failure to follow instructions and to take initiative and follow through to a conclusion on Taxpayer Delinquent Accounts; and your inability to perform adequately under other than exceptionally close supervision, all of which serve as evidence of your inability to perform the duties of a Revenue Officer.

Subsequently, at petitioner's request, the District Director conducted an investigation of the dismissal, and determined that petitioner had been afforded every opportunity to demonstrate fitness for the job, but that, after several admonitions, petitioner's continued poor work performance and attitude made separation from the I.R.S. necessary (R. 51). Petitioner was given an opportunity, in a meeting with the District Director, to rebut statements contained in the notice of May 26, 1964; petitioner confined himself to asserting that he had received no on-the-job supervision, that he had never been advised of his poor performance by his instructors, and that he had not received proper instruction. Petitioner's supervisor presented evidence of numerous field trips, and interagency evaluations, memoranda and records in support of petitioner's separation. The District Director concluded that the separation recommendation was correct. R. 42.

On February 22, 1966, petitioner instituted this suit in the Court of Claims seeking to recover a sum

equivalent to the salary he would have received during the period from the time of his discharge to the present. Both parties moved for summary judgment. In support of his motion, petitioner argued that his dismissal violated 5 C.F.R. 9.103(a) (repealed 1962) and 5 C.F.R. 315.803 (1964 ed.) in that he was not given the proper training for his job and thus did not receive a "full and fair trial in the performance of [his] duties" (5 C.F.R. 9.103(a)). Petitioner also urged that the training that he received was less adequate than that promised in a Treasury Department recruiting circular (Pet. App. A–2–3) on which he had relied in taking the job. On May 15, 1967, the Court of Claims dismissed petitioner's suit, finding that "no procedural errors have been alleged or shown and that there is no substance to the claims that the reason given for plaintiff's dismissal was unsupported or that he was not given the proper training or schooling" (Pet. App. A-1).

2. The petition "addresses itself primarily to the premise that petitioner's claim that he did not receive proper training and/or schooling, despite respondent's undertaking to provide same, was supported by substantial evidence and that it was error for the Court of Claims to ignore that evidence" (Pet. 4). The evidentiary issue thus presented obviously does not warrant review by this Court. While petitioner contends that the Court of Claims ignored the evidence in reaching its conclusion that the administrative action was supported by the record and that petitioner was given proper training, we can see no occasion for this Court to undertake to reevaluate the

evidence. Cf. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490–491. Furthermore, petitioner's argument ignores the limited scope of judicial review in employee discharge cases. Thus, it is well settled that the courts are not to review the merits of a decision to suspend or remove a government employee and that the only issue properly reviewable is whether the action taken was in accordance with applicable procedures and not inconsistent with statutory requirements or constitutional rights.[2]

3. Petitioner also contends (Pet. 5–6) that the description of the I.R.S. training program in a recruiting circular constituted an offer which, once accepted by petitioner, bound the United States contractually. That contention is contrary to familiar principles of contract law. Circulars and advertisements are not normally considered to be offers but rather are methods of attracting interested parties. See *A. E. Staley Mfg. Co.* v. *Northern Cooperatives, Inc.*, 168 F. 2d 892 (C.A. 8); *Harvey* v. *United States*, 8 Ct. Cl. 501; *Montgomery Ward and Co.* v. *Johnson*, 209 Mass. 89, 95 N.E. 290; Corbin, *Contracts* § 28; Williston, *Contracts*, § 27; cf. *Refinery Equipment, Inc.* v. *Wickett Refining Co.*, 158 F. 2d 710 (C.A. 5). In all events, it was unnecessary for the Court of Claims to determine whether the United States was contractually bound by the terms of the recruiting circular since it

[2] *Brown* v. *Zuckert*, 349 F. 2d 461 (C.A. 7), certiorari denied, 382 U.S. 998; *Seebach* v. *Cullen*, 338 F. 2d 663 (C.A. 9), certiorari denied, 380 U.S. 972; *McTiernan* v. *Gronouski*, 337 F. 2d 31 (C.A. 2); *Saggau* v. *Young*, 240 F. 2d 865 (C.A.D.C.); *Haynes* v. *Thomas*, 232 F. 2d 688 (C.A.D.C.).

held that there was "no substance" to the claim that petitioner was not given proper training (Pet. App. A-1).

For the foregoing reasons the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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